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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.

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PETITION FOR A WRIT OF CERTIORARI

Francis Edwin Bass, Jr., Marvin L. Jones, James R. Marvin, Wilton A. Hockenberry, Catherine Louise Moyers, John Gilreath, Mildred B. Jenkins, and J. Loring Jenkins, on their own behalf and on behalf of all others similarly situated,[1] hereby petition this Court for a writ of certiorari to the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina on petitioners' petition for rehearing (App. A *infra* at 1a-10a) is reported at 395 S.E.2d 171. Its original opinion

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[1] The class certified by the trial court includes approximately 70,000 similarly situated federal annuitants who have opted to join this suit. Transcript of Record ("Tr.") 58-72.

(App. B *infra* at 12a-20a), as well as the decision of the trial court (App. C *infra* at 21a-28a), are unpublished.

JURISDICTION

The Supreme Court of South Carolina issued its opinion reversing the trial court and denying petitioners' entitlement to tax refunds on May 23, 1990. App. B at 12a. Petitioners' timely petition for rehearing was denied on July 31, 1990. App. A at 11a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

This case arises in the wake of this Court's decision in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989), which invalidated Michigan's discriminatory taxation of annuities of retired federal employees. In *Davis*, this Court held that 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity, as derived from the Supremacy Clause, prohibit states from taxing federal annuitants more harshly than state annuitants. South Carolina, like Michigan and approximately twenty other states, exempted from state income taxation annuities of retired state and local employees while taxing annuities of retired federal employees. *See* S.C.Stat.Ann. § 12-7-435 (1976). Petitioners are a certified class of all retired federal employees, both civilian and military, who had paid South Carolina state income tax on their federal annuities.

After this Court's March 28, 1989 decision in *Davis* and before the deadline in South Carolina for filing

amended returns for refunds for the 1985 tax year, the South Carolina Tax Commission issued numerous news releases informing federal retirees that they could file amended tax returns with the State Tax Commission to protect their refund rights. App. D at 29a-35a. Petitioners accordingly submitted amended state income tax returns for the tax years 1985 through 1988 seeking refunds for all taxes they paid on that portion of their income consisting of federal retirement income. The South Carolina Tax Commission refused to grant any *Davis*-related refund claims. Tr. 35-36, 41. The claims of the class members and the named petitioners were specifically denied. Tr. 35-36.

Petitioners filed suit in Horry County Court of Common Pleas seeking refunds for taxes "erroneously, improperly or illegally assessed, collected or otherwise paid over to the [Tax] Commission." S.C.Stat.Ann. § 12-47-440 (1976). On June 8, 1989, a new state law, S.C.Stat.Ann. § 12-47-445, was enacted, effective immediately. This new statute purported to divest petitioners of their right under § 12-47-440 to obtain refunds. The Horry County Court certified a class action encompassing all *Davis*-related refund claimants on August 30, 1989. Tr. 58-72.

The trial court ultimately found that petitioners were entitled to refunds pursuant to state law, citing § 12-47-440 as well as a string of South Carolina judicial decisions. App. C at 21a-28a. The court also found that the State's after-the-fact passage of a statute purporting to limit petitioners' "vested right" to seek a refund had no effect as to the refunds sought, as the taxes in question all predated the statute in question. App. C at 24a-27a.

The State appealed. On May 23, 1990, the South Carolina Supreme Court issued a decision reversing the trial court's decision in favor of the refund claimants. App. B at 12a-20a. The basis for the reversal was the finding

that the *Davis* decision applied prospectively only. App. B at 17a-20a. On July 31, 1990, on petitioners' petition for rehearing, and following this Court's decisions in *American Trucking Ass'n* v. *Smith*, 110 S.Ct. 2323 (1990), and *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990), the South Carolina Supreme Court amended its earlier decision, adding a suggestion that petitioners had not satisfied state tax refund requirements because the taxes in question had not been paid "under protest." App. A at 8a-9a. The question whether petitioners needed to file under protest had neither been argued nor briefed during the course of the litigation, nor had the issue been raised by proper exception as required under South Carolina appellate practice; rather, the issue arose for the first time in the South Carolina Supreme Court's July 31, 1990 amended opinion. Notwithstanding its reference to this issue, however, the court below explicitly concluded: "Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law." App. A at 9a. Thus no state law ground independently supports the decision below.

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the propriety of states retaining taxes imposed in violation of the Constitution of the United States. Common to several cases decided last Term and several pending this Term, this petition questions whether it is a proper judicial function for courts to decree the effective dates of decisions of this Court striking down state taxes on constitutional grounds.

In addition, this petition raises the specific question whether this Court's decision in *Davis* v. *Michigan* may in any circumstance be applied in a prospective-only fashion so as to deny tax refunds to federal retirees.

Like South Carolina and Michigan, approximately twenty other states granted tax preferences to state retirees that were not granted to federal retirees. While refund actions have been brought in each of these states, only one other case, besides the instant action, has reached a state court of last resort. In that case, the court held that refunds must be paid. *Hackman* v. *Director of Revenue*, 771 S.W.2d 77 (Mo. banc 1989), *cert. denied*, 110 S.Ct. 718 (1990). Lower state courts have split on the question of whether *Davis* must be applied retroactively. Review by this Court is needed to resolve this recurring issue of demonstrated complexity and divisiveness.

1. The court below wilfully and explicitly refused to give force and effect to the Constitution of the United States. Rather than enforce the applicable constitutional mandate in the case before it, the court below instead rejected that mandate, with only a promise to apply it in some unspecified future cases. No court can have such license.

The court below justified its refusal to order refunds on the basis of a putative "prospective-only" application of this Court's decision in *Davis* v. *Michigan*. That is, the court refused to order refund of the taxes, pretending instead that the taxes were constitutional when exacted. Thus, the court below treated *Davis* as if it were not a pronouncement of constitutional law, but instead as if it represented an amendment to the Constitution itself.

Setting the effective date of constitutional mandates is simply not a proper judicial function: courts are "to declare what the law is, not to prescribe what it shall be." *American Trucking Ass'ns*, 110 S.Ct. at 2343 (Scalia, J., concurring). *See also id.* at 2350 (Stevens, J., dissenting) ("adherence to legal principle requires that we determine the rights of litigants in accordance with our best current understanding of the law"). Decreeing

prospective-only effect to a court decision is nothing short of judicial legislation. *Mackey* v. *United States*, 401 U.S. 646, 681 (1971) (Harlan, J., concurring).[2] It is not within any court's power to amend the Constitution; similarly it cannot be within any court's power to decree when a particular provision of the Constitution shall take effect. Such decisionmaking is utterly and irreconcilably at odds with the judicial role.

This Court has pending, or has recently had before it, nearly a dozen cases questioning the prospective-only application of a decision invalidating state taxes. In all but one case (*Hackman* v. *Department of Revenue*), the state court refused refunds by denying retroactive effect to the decision invalidating the tax. And notwithstanding that the Court issued four opinions in this area last Term,[3] three cases in addition to this are already before the Court this Term challenging prospective-only application of decisions invalidating state tax schemes.[4]

Review by this Court is needed to provide guidance in this area of recurring litigation. Each case challenging a state tax on federal constitutional grounds should not

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[2] [T]he Court's assertion of power to disregard current law in adjudicating cases before us . . ., is quite simply an assertion that our constitutional function is not one of adjudication but in effect legislation. We apply and definitively interpret the Constitution, under this view, not because we are bound to, but only because we occasionally deem it appropriate, useful or wise. That sort of choice may permissibly be made by a legislature or a counsel of revision, but not a court of law.

See also Desist v. *United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

[3] *American Trucking Ass'ns; McKesson; National Mines Corp.* v. *Caryl*, 110 S.Ct. 3205 (1990); and *Ashland Oil Co.* v. *Caryl*, 110 S.Ct. 3202 (1990).

[4] *James B. Beam Distilling Co.* v. *Georgia*, U.S. No. 89-680; *Associated Grocers, Inc.* v. *Washington*, U.S. No. 90-281; and *Norwest Bank Duluth, N.A.* v. *Minnesota Commissioner of Revenue*, U.S. No. 90-645.

have to come before this Court twice—once on the merits and once again on the issue of relief. Extension of the *Griffith* rule[5] to this area of jurisprudence would eliminate this costly and needless second round of litigation. See *American Trucking Ass'ns*, 110 S.Ct. at 2343 (Scalia, J., concurring), at 2350 (Stevens, J., dissenting). In any event, analysis under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), has proved unworkable: the steady stream of cases to this Court challenging prospective-only applications demonstrates that the presumption of retroactivity inherent in our jurisprudence[6] has been reversed. So long as state courts have any leeway in determining when to apply this Court's mandates they will be urged to opt for "protective" (*i.e.*, nonretroactive) application. *National Can Corp.* v. *Department of Revenue*, 749 P.2d 1286, 1293 (Wash.), *appeal dism'd and cert. denied*, 486 U.S. 1040 (1988). At a minimum, review by this Court is needed to clarify the standards by which courts may depart from full retrospective operation of this Court's decisions to assure that prospective-only application, if at all permissible, is indeed the rare exception and not the rule.

2. The specific question presented in this petition, whether refunds of state income tax imposed in violation of 4 U.S.C. § 111 may be denied through a prospective-only application of *Davis* v. *Michigan*, is currently being litigated in approximately twenty states. Some courts have applied the *Chevron* test and concluded that refunds must be paid; other courts have concluded that *Davis* should be applied nonretroactively so as to deny

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[5] *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), held that new rules of criminal procedure must be applied retroactively to all cases pending on direct review or not yet final.

[6] *United States* v. *Security Industrial Park*, 459 U.S. 70, 79 (1982) (that "judicial decisions operate retrospectively . . . is familiar to every law student"); *Robinson* v. *Neil*, 409 U.S. 505, 507-08 (1973) ("general rule of retroactivity").

refunds. The question of the prospective/retrospective effect of Supreme Court decisions is ultimately a question of federal law. *Ashland Oil Co., Inc.* v. *Caryl*, 110 S.Ct. at 3204. Review by this Court is needed to conform the divergent opinions of the lower courts on this question.

As noted above, the Supreme Court of Missouri ordered that refunds be paid. *Hackman*, 771 S.W.2d at 81. Similarly, in New Mexico, refunds were mandated pursuant to the state refund statute, with retroactivity of *Davis* given as an alternative basis for refunds. *Burns* v. *New Mexico*, No. SF 89-1314(c) (1st Jud. Dist., Santa Fe County), Letter Decision, April 5, 1990. After this Court's decisions in *American Trucking Ass'ns* and *McKesson*, the State of New Mexico declined to appeal, and has now agreed to pay full refunds.

No other state has finally resolved this issue; however, several trial courts have followed Missouri's lead. For example, Arkansas has followed the Missouri analysis in awarding retirees full refunds. *Bosnick* v. *Pledger*, No. 89-1451 (Pulaski County Court), Findings of Fact and Conclusions of Law, November 1, 1989. In light of the dispositive state refund statute, the Arkansas court saw no reason to engage in the *Chevron* analysis.

In Colorado, full refunds were also ordered. *Reimer* v. *Dir. of Dept. of Revenue*, No. 89CV3837 (El Paso County Court), Order, April 13, 1990. The court held that refunds were required pursuant to the decisions in *Davis* and *Iowa-Des Moines Bank* v. *Bennett*, 284 U.S. 239, 247 (1931), both of which indicate that refunds must be paid "without reference to whether retroactive application of the ruling was a relevant concern." Order at 3. Moreover, the Colorado court found that even if the *Chevron* analysis were applied, full retroactivity of *Davis* would be required. *Id.* at 3-4.

Full refunds were also granted in New York. *Duffy* v. *Wetzler*, No. 7706/89 (S.Ct. of Queens County), Mem. Decision, April 13, 1990. The state refund statute pro-

vides for refund of "overpaid" taxes. As the state tax discrimination against federal retirees was improper, the court held that the state refund statute mandates that refunds be paid.

Similarly, refunds have been ordered in North Carolina, Michigan and Alabama. *Swanson* v. *North Carolina*, No. 90 CVS 03127 (Wake County Superior Court), Decision, Oct. 3, 1990; *Fonger* v. *Dept. of Treasury*, MTT No. 132625 (Michigan Tax Tribunal), Opinion and Judgment, June 11, 1990. The Michigan Tax Tribunal noted its explicit reliance upon the refund analysis applied in Missouri and New York. *Fonger* at 20. In Alabama, refunds were ordered based upon a finding that the *Davis* decision was "inevitable," thereby undercutting the State's claim that it could not have foreseen the outcome. *Rinehart* v. *Sizemore*, No. CV-89-704-M (Cir. Ct. of Montgomery County), Order, October 9, 1990, at 4.

In Arizona, the trial court held that full retroactivity of *Davis* was required under the *Chevron* analysis, because the balance of equities favored granting refunds to the extent the federal retirees were harmed by the discrimination. *Bohn* v. *Waddell*, No. TX 89-00050 (Arizona Tax Court), Opinion, April 6, 1990. Yet refunds were limited to the amount of taxes foregone by the state in not taxing their own annuitants rather than the taxes actually paid by the federal retirees. *Id.* at 37, 42-47.

In contrast, other state trial courts have denied all refunds, finding that the *Davis* decision does not apply retroactively. In *Harper* v. *Commonwealth*, No. CL891080 (Cir. Court for Alexandria), Order, March 12, 1990, a trial court in Virginia ruled that the *Chevron* test was applicable and required nonretroactive application of *Davis*. Similarly, a trial court in Montana refused to accord *Davis* retroactive effect. *Sheehy* v. *Montana*, No.

BDV-89348 (Mont. 1st Judicial Court), Order, July 11, 1990. Litigation in other states is ongoing: for example, cases are pending in administrative tribunals in Oklahoma and Louisiana, and in state courts in Georgia and Mississippi.[7]

There is a wide disparity in the results achieved and rationales employed by the lower courts in addressing the issue of refunds under *Davis*. Because resolution of these cases will focus on the retroactivity of *Davis*, the lower courts need a definitive interpretation of this federal question. Review by this Court is thus necessary to conform the diverse results and rationales of the lower courts and provide guidance on this question of substantial importance to numerous states and hundreds of thousands of retired federal employees.

3. The court below declined to give retrospective effect to *Davis* by purportedly "follow[ing] a *Chevron* analysis consistent with" that employed by this Court in *American Trucking Ass'ns*. App. A at 9a n.6. While the plurality opinion in *American Trucking Ass'ns* did authorize

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[7] In addition to the litigation referenced in the text, the following *Davis*-related refund actions are pending: in Colorado, *Kuhn* v. *Tipton*, No. 89CV9164 (Denver Dist. Ct.); in Georgia, *Wetzel* v. *Collins*, No. 1:89-CV-758-JOF (N.D. Ga.); in Iowa, *McManus* v. *Iowa*, No. C89-179 (N.D. Iowa); in Kansas, *Barker* v. *Kansas*, No. 89CV666 (Shawnee County Dist. Ct.); in Kentucky, *Gossum* v. *Kentucky*, No. 89-CI-248 (Marshall Cir. Ct.); in Louisiana, *Ponthier* v. *Sec. of Dept. of Revenue and Taxation*, BTA No. 3396 (Board of Tax Appeals), *Ponthier* v. *Broussard*, No. 344,035 (19th Jud. Dist. Ct.); in Maryland, *Doneski* v. *Comptroller of Treasury*, No. 3126 (Tax Court); in Massachusetts, *Filios* v. *Comm. of Revenue*, No. 171106 (Appellate Tax Board); in Mississippi, *Todd* v. *Tax Commission*, No. 139915, and *Winstead* v. *Marx*, No. 141652 (Chancery Ct., 1st Jud. Dist. of Hines County); in Oklahoma, *Worrell* v. *Tax Commission*, No. DR-016 (Ok. Tax Division); in Oregon, *Nutbrown* v. *Munn*, No. S36652 (Oregon Supreme Court); in Utah, *Brumley* v. *Tax Commission*, No. 89-0903618 (Utah Dist. Ct.).

Chevron analysis in cases such as this, the result reached by the court below is an untenable application of that analysis. Under the facts of this case, none of the *Chevron* factors justifying departure from the rule of full retroactivity is satisfied.

a. As a threshold matter, full retroactivity of a court decision may be denied only if the decision in question "establish[es] a new principle of law." *Chevron*, 404 U.S. at 106. If a decision does not "break" from past precedent, then there is no occasion to inquire whether it need be applied prospectively only. *See United States* v. *Johnson*, 457 U.S. 537, 550 and n.12 (1982); *McKesson*, 110 S.Ct. at 2247 n.15; *Ashland Oil* v. *Caryl*, 110 S.Ct. at 3204.

The court below held that *Davis* satisfied this threshold test because *Davis*, "for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee." App. A at 7a. The "clear past precedent" invalidated by *Davis*, the court concluded, was the absence of a previous challenge to the tax statute in question. *Id.* These holdings by the court below betray a complete misapprehension of the nature of *Chevron*'s threshold test.

That *Davis* "for the first time held that the doctrine of intergovernmental tax immunity" reached federal retirees does not satisfy the first *Chevron* test. There is something unique about virtually every case heard by this Court—if an issue has been resolved, it is hardly likely that this Court would grant certiorari merely to reiterate that holding. But not every case heard by this Court satisfies the threshold *Chevron* test; indeed it is the exceptionally rare case that "establish[es] a new principle of law" within the meaning of *Chevron*. A case, like *Davis*, that "simply appl[ies] settled precedent to a new set of facts" is not such a case. *United States* v. *Johnson*, 457 U.S. at 551.

The holding in *Davis* followed naturally and unexceptionally from settled law. The first aspect of the *Davis* decision, that retirement benefits were encompassed within 4 U.S.C. § 111, was established by Congressional intent in 1920 (*see, e.g.*, 59 Cong. Rec. 6300 (April 29, 1920) (statement of Rep. Hamill: federal pensions "should be looked upon as deferred wages")), and routinely confirmed in judicial decisions such as *Kizas* v. *Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The second aspect of the *Davis* decision, that the differential tax treatment of federal and state retirement benefits amounted to "discrimination" under 4 U.S.C. § 111, was no longer in question following *Phillips Chemical Co.* v. *Dumas*, 361 U.S. 376 (1960), and *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983).[8] In truth, not a single new principle of law was established in *Davis*. *See Rinehart*, *supra*, at 4 (*Davis* was "inevitable"). Indeed, the *Davis* decision rested on precedent that had its genesis is *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

This Court's recent decisions in *Ashland Oil Co., Inc.* v. *Caryl*, 110 S.Ct. 3202, and *National Mines Corporation* v. *Caryl*, 110 S.Ct. 3205, well illustrate the error of the court below. In rejecting the claim of nonretroactivity in these cases, the Court held that the *Armco* decision (*Armco* v. *Hardesty*, 467 U.S. 638 (1984)) could not satisfy the threshold test under the *Chevron* analysis:

> *Armco* neither overturned established precedent nor decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, supra, at 106. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc.* v. *Washington State Dept.*

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[8] As stated in *Phillips Chemical Co.*, 361 U.S. at 385: "It does not seem too much to require that the State treat those who deal with the [federal] government as well as it treats those with whom it deals itself." *See Davis*, 489 U.S. at —— n.4, 109 S.Ct. at 1507 n.4.

> *of Revenue*, 483 U.S. 232 (1987), which arguably "overturned a lengthy list of settled decisions" and "revolutionized the law of state taxation," *id.*, at 257 (Scalia, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary.

110 S.Ct. at 3205 (footnote omitted).

Certainly *Armco* was far more novel than *Davis*. The *Davis* decision explicitly reveals its precedential basis, and finds the law to be settled. *Davis*, 489 U.S. at ——, 109 S.Ct. at 1504-08. By comparison, *Armco* formed the basis for a "revolutionary" extension of the "internal consistency test." *Ashland Oil*, 110 S.Ct. at 3205. If, as this Court held, *Armco* fails the first prong of the *Chevron* test because it "did not overrule clear past precedent nor decide a wholly new issue of first impression," 110 S.Ct. at 3205, then *Davis*, a less exceptional decision, necessarily falls short of the same *Chevron* standard. Accordingly, the determination by the court below that *Davis* satisfies the threshold *Chevron* test is clear error.

b. The second *Chevron* factor calls for courts to evaluate the purpose and effect of the constitutional rule in question and ascertain whether retrospective operation will further or retard the rule's operation. *Chevron*, 404 U.S. at 106. The court below concluded that this factor weighed in favor of nonretroactivity because South Carolina had repealed the statute in question. App. A at 7a. Yet this analysis says nothing: this Court in *Davis* invalidated the statute irrespective of whether the Legislature subsequently repealed it.

The court below found nothing to suggest that retroactive application of *Davis* would *retard* the operation of the Supremacy Clause, and thus its conclusion that this factor weighed in favor of nonretroactivity is untenable. More significantly, however, the court below overlooked the manifold ways in which retroactive appli-

cation of *Davis* is necessary to effectuate the purposes of the Supremacy Clause.

First, central to the Supremacy Clause is the tenet that federal statutory enactments supervene state laws. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Davis* rested not only upon the constitutional principle of intergovernmental tax immunity, but also upon the unambiguous force of the Public Salary Tax Act of 1939, 4 U.S.C. § 111. *Davis*, 489 U.S. at ——, 109 S.Ct. at 1503-07. The court below, by asserting the nonretroactivity of *Davis*, has effectively held that 4 U.S.C. § 111 did not apply in South Carolina until March 28, 1989 (when this Court decided *Davis*), fifty years after Congress passed the statute. Delaying the effective date of federal legislation is beyond the power of state courts and legislatures. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) at 439 ("States have no power by taxation or otherwise to reduce or impede powers vested in the general government."). Retroactivity of *Davis*, therefore, would directly further the fundamental Supremacy Clause principle that federal statutes upon enactment are the supreme law of the land.[9]

In addition, taxpayers have legitimate compensatory interests safeguarded by the Supremacy Clause. *See, e.g.*, *Green* v. *Mansour*, 474 U.S. 64, 69 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of the law"). Moreover, South Carolina's violation strikes at the heart of the purposes of the intergovernmental tax immunity doctrine—South Carolina's tax scheme caused the federal government to subsidize

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[9] Even after this Court's decision in *Davis*, South Carolina continued to collect the unconstitutional tax. *See* App. D at 33a. Indeed, in Mississippi, the State continued the discriminatory taxation until January 1, 1990. *See* Mississippi Code § 27-7-51 (3) (1990). Allowing states to defy Congress' statutory commands and the holdings of this Court turns the Supremacy Clause on its head.

state retirement benefits at the direct expense of federal employees. As this Court held in *Davis*:

> Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.

489 U.S. at —— n.4, 109 S.Ct. at 1507 n.4. The legal principle at issue in *Davis* is the illegality of state taxation that causes the federal government and its employees to subsidize state employment costs. *Id.* Thus, partial retraction of that subsidy through retroactivity of *Davis* would directly effectuate the legal principle in *Davis*. *Compare American Trucking Ass'ns*, 110 S.Ct. at 2332 (retroactivity not necessary to effectuate purposes of Commerce Clause).

Further, to allow the states to retain unconstitutionally exacted taxes provides them with a naked financial incentive to collect taxes aggressively even where, as here, the tax causes unconstitutional financial harm to the federal treasury, and well-settled legal principles expose the illegality of the tax at the time it is collected. So long as a state may take refuge in prospective-only application of decisions invalidating its tax schemes, it will be encouraged to tax beyond constitutional limits. Retroactive application of *Davis* would sharply reduce the states' financial incentive for unconstitutional taxation.

Finally, retroactive application of *Davis* will cause refunds to be made to refund claimants. At current federal tax rates the United States government stands to obtain perhaps one-fourth or more of the refunds made to federal retirees. While retroactive application of *Davis* will not allow the federal government to recoup all the involuntary and unconstitutional subsidy it has been paying to South Carolina and other states for almost half a century, it will at least provide some recompense to the federal fisc. This recovery of improper subsidies would plainly further the purposes of the intergovernmental tax immunity doctrine.

c. The third *Chevron* factor calls for balancing the equities of prospective-only versus retroactive application of the decision. The court below concluded that this balance favored prospective-only application of *Davis* because "[t]he refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State." App. A at 8a. The court did not explain how this financial burden could be any heavier on the state, and all its taxpayers, than on the select minority of taxpayers who had unconstitutionally been forced to shoulder this burden. Therein lies its most egregious error.

With the possible exception of cases involving overturning of Supreme Court precedent, *see American Trucking Ass'ns*, 110 S.Ct. at 2334, as a matter of federal law, the equities favor the citizen's compensatory interests over that of a governmental entity. As stated in *Owen* v. *City of Independence*, 445 U.S. 662, 655 (1980):

> even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Federal law aside, it is simply more equitable to place the financial consequences of an unconstitutional income tax upon the government (and thus the citizenry as a a whole) than upon a select subclass of taxpayers who had unconstitutionally been forced to pay the tax in the first instance.

The court below held that equity tilts in the State's favor because it has already allocated the money petitioners claim as a refund. App. A at 8a. In so holding, it has artificially distinguished the State from its citizens and taxpayers: the question here is not whether the State, as

some abstract entity, needs the money more than the taxpayers from whom it unconstitutionally exacted the taxes, but rather whether taxpayers who have been paying more than their proper share of taxes should be reimbursed by those who have paid less.

At bottom, the holding below is simply that retroactive application of *Davis* is too expensive. But the purported magnitude of the refund claims cannot add any substance to the State's plea of inequity. It is indeed a perverse suggestion that the greater the magnitude of its constitutional violation, the stronger the State's equitable claim not to remedy it. The court below erred in adopting a rationale so deeply and fundamentally flawed.

4. The decision below contains a suggestion that state law might provide an independent ground for denial of refunds. This suggestion, however, poses no obstacle to granting the petition. First, the decision below explicitly abnegates reliance on state law grounds: "Because we find that *Davis* is not to be retroactively applied, we do not need to engage in any analysis of state law." App. A at 9a. As the South Carolina Supreme Court has denied reliance upon state law grounds, this Court possesses full authority to review the important federal question explicitly decided below, that is, whether *Davis* is to apply retroactively. *See, e.g., Lawrence* v. *Tax Comm. of Mississippi*, 286 U.S. 276, 282-83 (1932) ("illusory" or "unsubstantial" nonfederal ground for decision below poses no impediment to this Court's jurisdiction).

Second, even had the court below relied on the state law ground referenced in its decision (despite its explicit disavowal of such reliance), the ostensible state law ground itself would generate an issue of federal law. Specifically, the decision below purports to fault petitioners for failing to pursue their refund claims by paying the taxes "under protest." App. A at 9a. This "pay under protest" rule, suggests the court below, is a "procedural requirement" on postdeprivation relief sanctioned by this

Court in *McKesson. Id., citing McKesson*, 110 S.Ct. at 2254.

This reliance on *McKesson* is wholly misplaced: while *McKesson* does authorize procedural limitations on refund actions, it reaffirms the rudimentary constitutional principle that taxpayers must be afforded a "clear and certain" postdeprivation remedy. 110 S.Ct. at 2251, *quoting Atchison T. & S.F.R. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912). Under the facts of this case, South Carolina's "pay under protest" procedure is anything but a clear and certain remedy sufficient to meet petitioners' Fourteenth Amendment rights.

The record here shows that: immediately after *Davis* was decided, and through the April 15, 1989 deadline for filing state tax returns, the State Tax Commission explicitly informed taxpayers to follow the "amended return" method for claiming refunds, App. D at 29a-35a; the state statute under which petitioners sued (S.C.Stat.Ann. § 12-47-440) expressly authorizes refund claims for "voluntarily" paid taxes;[10] the South Carolina Supreme Court had held, as recently as 1987, that "voluntary" payments of unconstitutional taxes could be recovered through the statutory method chosen by petitioners (*Multi-Cinema, Ltd.* v. *South Carolina Tax Commission*, 357 S.E.2d 6, 7 (S.C. 1987)); the State Tax Commission had never before denied an income tax refund

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[10] The statute provides in pertinent part:

> Notwithstanding any other provision of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid . . . the taxpayer . . . may make application to the Commission to abate or refund in whole or in part such license fee or tax. . . . The provisions of this section shall apply whether or not the fee or tax in question was paid under protest . . . .

S.C. Stat. Ann. § 12-47-440. Title 12 of the South Carolina Code is entitled "Taxation," and it includes the income taxes at issue here. S.C. Stat. Ann. § 12-7-435.

for failure to pay under protest; the purported change to a "pay under protest" procedure was neither raised nor argued nor briefed by the State Tax Commission throughout this litigation; the trial court held that relief was available under § 12-47-440; concomitant with its repeal of the discriminatory tax scheme, the South Carolina Legislature specifically amended § 12-47-440 so that refunds would not be available to *Davis* claimants; and the State Supreme Court's original decision (App. B at 12a-20a) included no reference to a "pay under protest" requirement, but instead cited without comment the fact that petitioners had proceeded under § 12-47-440. App. B at 16a. Given this record, petitioners had no "clear and certain" remedy.

To the extent that the court below reversed itself in holding § 12-47-440 inapplicable here, its decision extinguishing petitioners' rights under that section is itself a denial of due process. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."). But even if § 12-47-440 did not apply to petitioners, then the confusion engendered by its existence (a confusion spawned by the plain language of the relevant statutory provision and the State Supreme Court's interpretation of that provision, and a confusion shared by the Tax Commission, the South Carolina Attorney General and the South Carolina Legislature) negates petitioners' constitutional right to a clear and certain remedy.

Petitioners' long-established remedial rights have been undercut through a questionable recasting of state tax procedures. Although the construction of § 12-47-440 by the court below is quite dubious, that question of state statutory construction need not be reviewed here. *Cf.*

Lawrence, 286 U.S. at 282-83 (inquiry into validity of purported state law ground is proper to assess whether purported ground is "unsubstantial" or "illusory"). Instead, the federal issue squarely raised is whether, on this record, petitioners' constitutional entitlement to a "clear and certain remedy" for unconstitutional deprivations has been infringed in violation of *McKesson*, 110 S.Ct. at 2251. We submit that this right has not only been infringed, it has been gutted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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October 24, 1990

APPENDICES

APPENDICES

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

Appeal From Horry County
Kaye G. Hearn, Judge
Sidney T. Floyd, Judge

Amended Opinion No. 23216

Heard May 7, 1990—Filed August 6, 1990

REVERSED

Chief Deputy Attorney General Joe L. Allen, Jr., Deputy Attorney General Ray N. Stevens, and Assistant Attorney General Arlene D. Hand, all of Columbia, for Appellants/Respondents.

Gene M. Connell, Jr., of Kelaher, Haar, Bass & Connell, of Surfside Beach, for Respondents/Appellants.

PER CURIAM: This action was commenced by federal retirees against the State of South Carolina and the South Carolina Tax Commission (hereafter, collectively referred to as the "State") on April 4, 1989. The action was brought because of a March 28, 1989 United States Supreme Court decision, *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), in which it was held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than the taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and was thus constitutionally prohibited.

Prior to the *Davis* decision, South Carolina had a statute that granted retired federal employees a $3000.00 exemption of retirement income from South Carolina income tax while retired state employees received a total exemption of their retirement income from South Carolina income tax. Since the *Davis* decision, South Carolina's income statute that applies to state and federal retirees has been amended so as to comply with *Davis*. However, the federal retirees claimed and the trial court agreed that the federal retirees were entitled to a refund for income taxes paid during the tax years of 1985 through 1988 pursuant to one of South Carolina's refund statutes, S.C. Code Ann. § 12-47-440 (1976). Although both parties appeal, the primary issues before this Court are whether: (1) the *Davis* decision should be applied prospectively from March 28, 1989, so as to deny federal retirees refunds, and (2) the enactment of S.C. Code Ann. § 12-47-445 (1989) operates to bar the federal retirees' claim for refunds. We reverse the order of the trial court which granted federal retirees a re-

fund of income tax collected by the state for the years 1985 through 1988.

I. DISCUSSION

PROSPECTIVE APPLICATION OF DAVIS

The United States Supreme Court did not announce whether its decision in *Davis* had retrospective or prospective application because Michigan conceded that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis v. Michigan Dept. of Treasury*, —— U.S. at ——, 109 S.Ct. at 1508-1509, 103 L.Ed.2d at 906. Here however, there is no such concession. Therefore, in order to determine whether federal retirees are entitled to a refund for monies paid under South Carolina's former discriminatory tax laws, we must first determine whether the holding of *Davis* is to be applied retroactively or prospectively. The State argues that we should apply the test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to determine whether *Davis* should be applied retrospectively or prospectively. By application of this test, the State contends that *Davis* need only be applied prospectively and the federal retirees would not be entitled to a refund. We agree.

Although this particular issue is one of first impression in this State, particularly in light of the fact that *Davis* was only recently decided, other courts such as the Arkansas Supreme Court in *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), have been faced with a similar question. In *Gray*, the Arkansas Supreme Court was faced with whether to apply the United States Supreme Court opinion in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) retrospectively or prospectively. In *Scheiner*, the United States Supreme Court held that another state's highway

tax which treated truckers whose base of operation were outside the state, differently from those based in the taxing state, violated the commerce clause. In response to the *Scheiner* decision, the Arkansas Supreme Court struck a similar taxing provision in *Gray*. After applying the test announced in *Chevron* for determining whether a judicial decision should be applied retroactively or prospectively, the Arkansas Supreme Court held that the United States Supreme Court decision in *Scheiner* should have prospective application only. Consequently, out-of-state truckers were denied refunds of taxes paid prior to the United States Supreme Court decision in *Scheiner*.

The Georgia Supreme Court has also followed an analysise consistent with *Gray* in an action for a refund of taxes. In *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), the distilling company sought a $2,400,000.00 refund for excise taxes paid in 1982, 1983, and 1984 pursuant to a Georgia statute, Ga. Code Ann. § 3-4-60 (1982), which imposed a higher tax on alcoholic beverages imported into Georgia than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The lower court found that the pre-1985 Georgia statute was unconstitutional because it violated the commerce clause of the United States Constitution, but that the ruling would only be applied prospectively so that the distilling company was not entitled to a refund.

On appeal, the distilling company argued that the lower court erred in applying the decision prospectively only and argued that Ga. Code Ann. § 48-2-35(a) (1982) which provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him

. . . ," mandated retroactive application of a constitutional decision. In rejecting the latter argument, the Georgia Supreme Court noted that the statute did not describe how it should be determined that a tax was "illegally assessed" and that the statute did not address the issue of retroactive versus prospective application of a constitutional decision.[1] In affirming the lower court's decision that the distilling company was not entitled to a refund, the Georgia Supreme Court first applied the test set forth in *Chevron* to determine whether to retroactively or prospectively apply a judicial decision, and found that only prospective application of the decision was appropriate. In holding that the decision should not be applied retroactively, the Georgia Supreme Court did not need to examine state law, primarily the refund statute, as to how to apply the decision retroactively.

Only one appellate court has had the opportunity to review specifically whether *Davis* should be applied retroactively or prospectively. In *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d 77 (Mo. 1989), the Missouri Supreme Court held that under *Davis*, Missouri's tax scheme which discriminated between state and federal retirees, violated the principles of intergovernmental tax immunity, and that the federal retirees were entitled to a refund under its statute. Rather than addressing whether *Davis* was to be applied retrospectively or prospectively, the majority in *Hackman* made a "quantum leap" from a determination that Missouri's tax law was unconstitutional, to a determination that refunds were due vis-a-vis its interpretation of Missouri's refund statute. It appears that the majority in *Hackman* interpreted the Missouri refund statute as al-

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[1] S.C. Code Ann. § 12-47-440 (1976), under which the federal retirees proceed for their refund allows an action for taxes "erroneously, improperly or illegally assessed . . ." This statute like the one in *Beam*, does not address the issue of retroactive versus prospective application of a constitutional decision.

ways mandating a tax refund when a statutory scheme is found to be unconstitutional.

We find that the analysis employed by the majority in *Hackman* is flawed in that the majority should have first determined under *Chevron*, whether *Davis* should be retrospectively or prospectively applied. Only upon a finding that *Davis* is to be retrospectively applied would the court need to examine state law to determine how to apply the *Davis* holding retroactively. On the other hand, upon a finding that *Davis* should only be applied prospectively, no further inquiry is needed. This analysis is consistent with that used by the Arkansas Supreme Court in *Gray* and the Georgia Supreme Court in *Beam* and additionally, is consistent with that suggested by the dissenting opinion in *Hackman*.

Hence, we will proceed under the United States Supreme Court's three-pronged test which was set forth in *Chevron* to determine whether prospective application of *Davis* is warranted. *Chevron* sets forth three factors that must be considered in cases dealing with the retroactivity question:

(1) Consider whether the decision to be applied establishes a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the in-

justice or hardship by a holding of nonretroactivity.

"It cannot be disputed that *Davis* represents both a new principle of law and a case of first impression." *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d at 86 (Welliver, J., dissenting). The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee. Prior to *Davis*, the State taxed some of the income of federal retirees and exempted the income of state retirees. This began in 1945 by the exemption of the benefits paid state retirees.[2] No similar provision existed that exempted all of the retirement income of federal retirees. During this time, federal retirees residing in South Carolina paid the tax without protest and did not raise the issue of intergovernmental tax immunity. Both the State and the federal retirees relied upon this tax treatment during this time. The *Davis* decision invalidated that clear past precedent and established a new principle of law. The first prong of the *Chevron* test is satisfied.

As to the second prong of the *Chevron* test, the Georgia Supreme Court in *Beam* held that it had no application "because the statute at issue was repealed . . ." Similar circumstances exist here. During all the years that the taxes were collected from the federal retirees, the State had no reason to believe the tax was unconstitutional. As soon as the State became aware of the unconstitutionality of the differential tax treatment between federal and state retirees, the legislature rectified the defects. Thus, the first and second prongs of the *Chevron* test appear to favor the prospective application of *Davis*.

All that remains to be considered is the third prong of *Chevron*, the weighing of the equities. If *Davis* is applied retroactively, the State faces liability for approxi-

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[2] Act No. 157, § 13, 1945 S.C. Acts 223.

mately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State.

We find that all parts of the *Chevron* test have been met and weigh heavily in favor of the prospective [3] application of the new principle of law contained in the *Davis* decision. Because we have not applied *Davis* retroactively and no refund is mandated [4] under our analysis, there is no need to examine state law.

Even were we to examine state law, the federal retirees would be barred from receiving a refund. The

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[3] This court has previously refused to give a United States Supreme Court decision retroactive effect based upon the impact of the decision on the State. *See Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984) (refusal to apply *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) retroactively because it "would disrupt the orderly process of probate" in South Carolina). *Wilson* has since been modified. *See, Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988).

[4] Although the federal retirees cite several United States Supreme Court cases for the proposition that the State cannot retain unconstitutionally collected taxes because a denial of refunds is itself a violation of constitutional rights, this argument is without merit. Those cases cited by the federal retirees for support of this proposition involve situations where the payment of taxes was made under protest or was compulsory (as where property is threatened to be seized or sold if taxes are not paid) rather than voluntary. *See Ward v. Board of County Com'rs of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931). In this case, the payments made by the federal retirees were voluntary, not coerced.

proper refund statutes under which the federal retirees should have proceeded are S.C. Code Ann. §§ 12-47-210 and 12-47-220 (1976), which require the taxpayer to pay under protest before bringing a refund action.[5] We have previously stated that the exclusive remedy for the recovery of the erroneous assessment of income taxes is through these "pay under protest" statutes. *See, Perpetual Bldg. & Loan Ass'n of Columbia v. South Carolina Tax Commission*, 255 S.C. 180 S.E.2d 195 (1971). The recent United States Supreme Court case of *McKesson Corp. v. Division of Alcoholic Beverage and Tobacco*, Op. No. 88-192 (U.S. filed June 4, 1990) reaffirms a state's ability to establish procedural requirements which must be complied with before a refund action is permitted. Here, the federal retirees did not comply with the "pay under protest" procedural mandates.

II. CONCLUSION

Under the *Chevron* test, we find that *Davis* is to be prospectively applied from the date the opinion was rendered, March 28, 1989, and that the federal retirees are not entitled to a refund of income taxes collected prior to that time.[6] Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law. Further, as the federal retirees are not entitled to relief, we do not need to address whether this action was properly maintained as a class action or whether the trial judge applied the proper interest rate to the refunds. The order of the trial court which granted the federal retirees a refund of income

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[5] Section 12-47-440 under which the federal retirees proceeded, deals only with the recovery of license fees and taxes. *See, City of Columbia v. Glens Falls Insurance Company*, 245 S.C. 119, 139 S.E.2d 529 (1964).

[6] In *American Trucking Associations, Inc. v. Smith*, Op. No. 88-325 (U.S. filed June 4, 1990), the United States Supreme Court followed a *Chevron* analysis consistent with that employed by this Court.

tax collected by the State for the years 1985 through 1988 is

REVERSED.

/s/ [Illegible], C.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

THE SUPREME COURT OF SOUTH CAROLINA

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body Politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

ORDER

The petition for rehearing in the matter of *Bass, et al. v. State of South Carolina, etc., et al.*, Op. No. 23216 (S.C. filed May 23, 1990) is denied. Additionally, the above referenced opinion is withdrawn and the following amended opinion is hereby issued in its place with additions or changes being made at the following places:

Page 2; Line 9 (Changes Made).

Pages 5-6 (Paragraph Added).

Page 6 (Footnote Nos. 5 and A Added).

/s/ [Illegible], C.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

Columbia, South Carolina

July 31, 1990

APPENDIX B

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body Politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

Appeal From Horry County
Kaye G. Hearn, Judge
Sidney T. Floyd, Judge

Opinion No. 23216

Heard May 7, 1990—Filed May 23, 1990

REVERSED

Chief Deputy Attorney General Joe L. Allen, Jr., Deputy Attorney General Ray N. Stevens, and Assistant Attorney General Arlene D. Hand, all of Columbia, for Appellants/Respondents.

Gene M. Connell, Jr., of Kelaher, Haar, Bass & Connell, of Surfside Beach, for Respondents/Appellants.

PER CURIAM: This action was commenced by federal retirees against the State of South Carolina and the South Carolina Tax Commission (hereafter, collectively referred to as the "State") on April 4, 1989. The action was brought because of a March 28, 1989 United States Supreme Court decision, *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), in which it was held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than the taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and was thus constitutionally prohibited.

Prior to the *Davis* decision, South Carolina had a statute that granted retired federal employees a $3000.00 exemption of retirement income from South Carolina income tax while retired state employees received a total exemption of their retirement income from South Carolina income tax. Since the *Davis* decision, South Carolina's income statute that applies to state and federal retirees has been amended so as to comply with *Davis*. However, the federal retirees claimed and the trial court agreed that the federal retirees were entitled to a refund for income taxes paid during the tax years of 1985 through 1988 pursuant to South Carolina's refund statute, S.C. Code Ann. § 12-47-440 (1976). Although both parties appeal, the primary issues before this Court are whether: (1) the *Davis* decision should be applied prospectively from March 28, 1989, so as to deny federal retirees refunds, and (2) the enactment of S.C. Code Ann. § 12-47-445 (1989) operates to bar the federal retirees' claim for refunds. We reverse the order of the

trial court which granted federal retirees a refund of income tax collected by the state for the years 1985 through 1988.

I. DISCUSSION

PROSPECTIVE APPLICATION OF DAVIS

The United States Supreme Court did not announce whether its decision in *Davis* had retrospective or prospective application because Michigan conceded that "to the extent appellant had paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis v. Michigan Dept. of Treasury*, —— U.S. at ——, 109 S.Ct. at 1508-1509, 103 L.Ed.2d at 906. Here however, there is no such concession. Therefore, in order to determine whether federal retirees are entitled to a refund for monies paid under South Carolina's former discriminatory tax laws, we must first determine whether the holding of *Davis* is to be applied retroactively or prospectively. The State argues that we should apply the test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to determine whether *Davis* should be applied retrospectively or prospectively. By application of this test, the State contends that *Davis* need only be applied prospectively and the federal retirees would not be entitled to a refund. We agree.

Although this particular issue is one of first impression in this State, particularly in light of the fact that *Davis* was only recently decided, other courts such as the Arkansas Supreme Court in *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), have been faced with a similar question. In *Gray*, the Arkansas Supreme Court was faced with whether to apply the United States Supreme Court opinion in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) retrospectively or prospectively. In *Scheiner*, the United States Supreme Court held that another state's highway tax which treated

truckers whose base of operation were outside the state, differently from those based in the taxing state, violated the commerce clause. In response to the *Scheiner* decision, the Arkansas Supreme Court struck a similar taxing provision in *Gray*. After applying the test announced in *Chevron* for determining whether a judicial decision should be applied retroactively or prospectively, the Arkansas Supreme Court held that the United States Supreme Court decision in *Scheiner* should have prospective application only. Consequently, out-of-state truckers were denied refunds of taxes paid prior to the United States Supreme Court decision in *Scheiner*.

The Georgia Supreme Court has also followed an analysis consistent with *Gray* in an action for a refund of taxes. In *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), the distilling company sought a $2,400,000.00 refund for excise taxes paid in 1982, 1983, and 1984 pursuant to a Georgia statute, Ga. Code Ann. § 3-4-60 (1982), which imposed a higher tax on alcoholic beverages imported into Georgia than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The lower court found that the pre-1985 Georgia statute was unconstitutional because it violated the commerce clause of the United States Constitution, but that the ruling would only be applied prospectively so that the distilling company was not entitled to a refund.

On appeal, the distilling company argued that the lower court erred in applying the decision prospectively only and argued that Ga. Code Ann. § 48-2-35(a) (1982) which provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . .," mandated retroactive application of a constitutional de-

cision. In rejecting the latter argument, the Georgia Supreme Court noted that the statute did not describe how it should be determined that a tax was "illegally assessed" and that the statute did not address the issue of retroactive versus prospective application of a constitutional decision.[1] In affirming the lower court's decision that the distilling company was not entitled to a refund, the Georgia Supreme Court first applied the test set forth in *Chevron* to determine whether to retroactively or prospectively apply a judicial decision, and found that only prospective application of the decision was appropriate. In holding that the decision should not be applied retroactively, the Georgia Supreme Court did not need to examine state law, primarily the refund statute, as to how to apply the decision retroactively.

Only one appellate court has had the opportunity to review specifically whether *Davis* should be applied retroactively or prospectively. In *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d 77 (Mo. 1989), the Missouri Supreme Court held that under *Davis*, Missouri's tax scheme which discriminated between state and federal retirees, violated the principles of intergovernmental tax immunity, and that the federal retirees were entitled to a refund under its statute. Rather than addressing whether *Davis* was to be applied retrospectively or prospectively, the majority in *Hackman* made a "quantum leap" from a determination that Missouri's tax law was unconstitutional, to a determination that refunds were due vis-a-vis its interpretation of Missouri's refund statute. It appears that the majority in *Hackman* interpreted the Missouri refund statute as always mandating a tax refund when a statutory scheme is found to be unconstitutional.

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[1] S.C. Code Ann. § 12-47-440 (1976), under which the federal retirees proceed for their refund allows an action for taxes "erroneously, improperly or illegally assessed . . ." This statute like the one in *Beam*, does not address the issue of retroactive versus prospective application of a constitutional decision.

We find that the analysis employed by the majority in *Hackman* is flawed in that the majority should have first determined under *Chevron*, whether *Davis* should be retrospectively or prospectively applied. Only upon a finding that *Davis* is to be retrospectively applied would the court need to examine state law to determine how to apply the *Davis* holding retroactively. On the other hand, upon a finding that *Davis* should only be applied prospectively, no further inquiry is needed. This analysis is consistent with that used by the Arkansas Supreme Court in *Gray* and the Georgia Supreme Court in *Beam* and additionally, is consistent with that suggested by the dissenting opinion in *Hackman*.

Hence, we will proceed under the United States Supreme Court's three-pronged test which was set forth in *Chevron* to determine whether prospective application of *Davis* is warranted. *Chevron* sets forth three factors that must be considered in cases dealing with the retroactively question:

(1) Consider whether the decision to be applied establishes a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

"It cannot be disputed that *Davis* represents both a new principle of law and a case of first impression." *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d at 86 (Welliver, J., dissenting). The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee. Prior to *Davis*, the State taxed some of the income of federal retirees and exempted the income of state retirees. This began in 1945 by the exemption of the benefits paid state retirees.[2] No similar provision existed that exempted all of the retirement income of federal retirees. During this time, federal retirees residing in South Carolina paid the tax without protest and did not raise the issue of intergovernmental tax immunity. Both the State and the federal retirees relied upon this tax treatment during this time. The *Davis* decision invalidated that clear past precedent and established a new principle of law. The first prong of the *Chevron* test is satisfied.

As to the second prong of the *Chevron* test, the Georgia Supreme Court in *Beam* held that it had no application "because the statute at issue was repealed . . ." Similar circumstances exist here. During all the years that the taxes were collected from the federal retirees, the State had no reason to believe the tax was unconstitutional. As soon as the State became aware of the unconstitutionality of the differential tax treatment between federal and state retirees, the legislature rectified the defects. Thus, the first and second prongs of the *Chevron* test appear to favor the prospective application of *Davis*.

All that remains to be considered is the third prong of *Chevron*, the weighing of the equities. If *Davis* is applied retroactively, the State faces liability for approximately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid

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[2] Act No. 157, § 13, 1945 S.C. Acts 223.

statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State.

We find that all parts of the *Chevron* test have been met and weigh heavily in favor of the prospective [3] application of the new principle of law contained in the *Davis* decision. Because we have not applied *Davis* retroactively and no refund is mandated [4] under our analysis, there is no need to examine state law.

II. CONCLUSION

Under the *Chevron test*, we find that *Davis* is to be prospectively applied from the date the opinion was rendered, March 28, 1989, and that the federal retirees are

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[3] This court has previously refused to give a United States Supreme Court decision retroactive effect based upon the impact of the decision on the State. *See Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984) (refusal to apply *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) retroactively because it "would disrupt the orderly process of probate" in South Carolina). *Wilson* has since been modified. *See, Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988).

[4] Although the federal retirees cite several United States Supreme Court cases for the proposition that the State cannot retain unconstitutionally collected taxes because a denial of refunds is itself a violation of constitutional rights, this argument is without merit. Those cases cited by the federal retirees for support of this proposition involve situations where the payment of taxes was made under protest or was compulsory (as where property is threatened to be seized or sold if taxes are not paid) rather than voluntary. *See Ward v. Board of County Com'rs of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931). In this case, the payments made by the federal retirees were voluntary, not coerced.

not entitled to a refund of income taxes collected prior to that time. Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law. Further, as the federal retirees are not entitled to relief, we do not need to address whether this action was properly maintained as a class action or whether the trial judge applied the proper interest rate to the refunds. The order of the trial court which granted the federal retirees a refund of income tax collected by the State for the years 1985 through 1988 is

REVERSED.

/s/ [Illegible] C.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

APPENDIX C

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 89-CP-26-1136

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH; MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit and on behalf of all others similarly situated,

Plaintiffs,

versus

STATE OF SOUTH CAROLINA, a body politic, and the SOUTH CAROLINA TAX COMMISSION,

Defendants.

ORDER FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY GRANTED TO THE PLAINTIFFS' AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DENIED

This is a class action brought by federal retirees to recover, pursuant to § 12-47-440, South Carolina Code of Laws, 1976, income taxes paid to the state upon retirement or pension income. Causes of action as to conversion and 42 U.S.C. § 1983 have been voluntarily dismissed without prejudice by the Plaintiffs with the ap-

proval of the Court. I find the Plaintiff class is entitled to partial summary judgment as to liability and order the Defendants to effect refunds of all taxes paid by class members on such income for the years 1985 through 1988.

This lawsuit was brought after the recent United States Supreme Court decision of *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989). In that case, the Court held that 4 U.S.C. § 111 precludes states from taxing the income of a retired federal employee differently than the income of a retired state employee. The South Carolina Income Tax statutes have required retired federal employees to pay income taxes while retired state employees were exempt. The South Carolina legislature corrected the tax statutes; however, Plaintiffs have filed this action for refunds of taxes paid for the last four years pursuant to § 12-47-440 of the South Carolina Code of Laws, 1976.

It is significant that the statutes have been amended by the General Assembly since the publication of the *Davis* opinion and the bringing of this class action. State and federal retirees' pension are now taxed equally. The statutes appear below in their pre-amendment form.

> § 9-1-1680. EXEMPTION FROM TAXATION AND LEGAL PROCESS: ASSIGNMENT. The right of a person to an annuity or retirement allowance or to the return of contributions, an annuity or retirement itself, any optional benefits, or any other right accrued or accruing to any person under the provisions of this chapter, and the monies of the system created hereunder are hereby exempted of any state or municipal tax, . . .
>
> § 12-7-435. DEDUCTIONS. There is allowed as a deduction from South Carolina taxable income of an individual the following amounts:
>
> a. Any retired person, or his surviving spouse, who receives a federal civil service retirement an-

nuity is allowed to deduct from taxable income Three Thousand and No/100 ($3,000.00) Dollars of the annuity received each taxable year exclusive of any exemption. . .

b. Any person retired from the uniformed services of the United States with 20 or more years active duty service, or his surviving spouse, is allowed to deduct from taxable income Three Thousand and No/100 ($3,000.00) Dollars of his uniformed services retirement pay received each taxable year. . .

* * *

d. All amounts received from the South Carolina Retirement System as provided in Title 9. . .

A review of these statutes reveals no difference in comparison to the statutes of Michigan which were struck down in *Davis*. The *Davis* Court stated that significant differences must exist between classes to justify dissimilar tax treatment. In this light, I am mindful that equal protection and due process concerns bear on the issues before me. *See, Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 52 S. Ct. 133, 76 L.E. 265 (1931); *Allegheny Pittsburgh Coal Company v. County Commission*, —— U.S. ——, 109 S.Ct. 633 (1989).

The Courts of Missouri, Arkansas, and Arizona have all considered issues identical to those in this case and have ordered refunds pursuant to *Davis*. The statutory refund procedures of each of these states are substantially identical to those of South Carolina in that each provides an applicable statute of limitations for refunds, each requires a claim to be filed with the Tax Commission, and each addresses circumstances upon which refunds will be appropriate. *See, Hackman v. Director of Revenue and the State of Missouri*, Opinion No. 71628, filed May 25, 1989; *Stanley Bosnick as Class Representative v. State of Arkansas*, Opinion No. 89-1451, filed

November 16, 1989; and *Bohn v. Waddell*, Superior Court of Arizona, Opinion No. TX 89-00050, Maricopa County, August 15, 1989.

At least 43,857 applicants have already filed for refunds pursuant to § 12-47-440 for the years 1985 through 1988. The majority of those refund applications were filed between the date the *Davis* decision was published and the date of enactment of § 12-47-445, June 8, 1989. I find that each individual class member who has filed a refund application for the years 1985 through 1988, or who shall henceforth properly file such an application within statute of limitations periods, is entitled to a refund in such amounts as he or she were illegally or improperly assessed.

Section 12-47-440 states that any tax erroneously, improperly or illegally assessed may be refunded. Substantial case law in this state is in accord that taxes which were erroneously, illegally or improperly assessed should be refunded. *See, American Hardware Supply Co. v. Whitmire*, 278 S.C. 607, 300 S.E.2d 289 (1983); *Meredith v. Elliott*, 247 S.C. 335, 147 S.E.2d 244 (1965); *Multi-Cinema Ltd v. S.C. Tax Commission*, 292 S.C. 411, 359 S.E.2d (1988).

Another issue before me concerns § 12-47-445. It states:

> A. Article 5, Chapter 47, Title 12 of the 1976 Code is amended by adding:
>
> "§ 12-47-445. The provision of § 12-47-440 do not apply to claims for abatement or refund resulting from a decision of a court of competent jurisdiction declaring a tax law of this state unconstitutional or otherwise unlawful. For purposes of this section, a final decision is the decision of a court declaring the law unconstitutional or otherwise unlawful and from which the appropriate officials of this state cannot or do not take an appeal or request a rehearing."

B. This section takes effect upon approval by the Governor.

Section 12-47-445 was not effective until it was signed by the Governor on June 8, 1989 and does not effect the taxes on retirement and pension income paid by the Plaintiff class for the years 1985 through 1988. Recent Supreme Court decisions involving the Tax Commission have held that individuals filing prior to the effective date of new tax legislation are entitled to protection under the previous law. *See, South Carolina National Bank v. South Carolina Tax Commission,* —— S.C. ——, 376 S.E.2d 512, (1989).

If § 12-47-445 were retroactive, it would have the effect of cutting off vested rights. *See, Vogel v. City of Myrtle Beach,* 291 S.C. 229, 353 S.E.2d 137 (1983). There also would be grave constitutional questions. *See, Duke Power Company v. South Carolina Tax Commission,* 81 F 2d 513 (1936); *Bradley v. Schoot Board of the City of Richmond,* 416 U.S. 696, 94 S.Ct. 2006 (1974). The law in South Carolina provides that statutes are to be construed prospectively and not retroactively unless there is clear legislative intent. I will not construe § 12-47-445 to apply to any refunds for the period from 1985 through 1988 without express statutory provisions and I further find that those individuals who filed refund applications after the enactment of § 12-47-445 shall be entitled to refunds for taxes paid before the enactment of that particular section.

I have reviewed examples of retroactive tax legislation including § 12-37-27 which specifically provided that it would affect vehicle registrations and license plates prior to its effective date. I find no such clear pronouncement in § 12-47-445 and am required to construe this statute as prospective. *See, Bartley v. Bartley Logging Co.,* 293 S.C. 88, 359 S.E.2d 55, (1987); *Boyd v. Boyd,* 277 S.C. 416, 289 S.E.2d 153 (1982); *Lindsay v. National Old*

Line Insurance Co., 262 S.C. 621, 207 S.E.2d 75 (1974). I am further satisfied that § 12-47-445 only amends and does not destroy the right of this Court to order tax refunds under § 12-47-440.

South Carolina law states that taxing statutes are not to be construed beyond the clear import of their language. Any substantial doubt as to the meaning of tax statutes is to be resolved in favor of the taxpayer. *Southeastern Fire Insurance Co. v. South Carolina Tax Commission*, 253 S.C. 407, 171 S.E.2d 355 (1969); *Ryder Truck Lines v. South Carolina Tax Commission*, 248 S.C. 148 (1966), 149 S.E.2d 435 (1966). The law in this state also provides that statutes authorizing suit for recovery of taxes paid will be liberally construed in the favor of the taxpayer. *Columbia Gas Light Company v. Mobley*, 139 S.C. 197, 137 S.E. 211 (1927); *Cooper River Bridge v. South Carolina Tax Commission*, 182 S.C. 72, 188 S.E. 508 (1936).

Our Supreme Court has further stated that the tax laws shall never be construed to require an individual class to contribute more than its fair share of the public burden. *Crescent Manufacturing Company v. Tax Commission*, 124 S.C. 761, 129 S.E. 480 (1924).

All of these cases bring me to the conclusion that § 12-47-445 is to be construed as prospective only and is not to effect any of the refund claims for the years 1985 through 1988, regardless of whether they were filed before or after the enactment of § 12-47-445. The feeling of this Court was echoed in a recent tax refund case, *Pittsburgh and Midway Coal Mining Company v. Arizona Department of Revenue*, Arizona Supreme Court No. CV-87-0460-PR, filed July 13, 1989. In that case, the Arizona Court of Appeals stated:

> "An honorable government would not keep taxes to which it is not entitled and the legislative scheme supports that result." *Id.* at 12.

I further note that this decision needs to address only refunds of taxes pursuant to § 12-47-440 since the legislature has corrected the relevant laws to provide that federal retirees and state retirees are taxed equally. I do not need to decide whether the prior statutes are unconstitutional.

The Court is not unmindful that this is a unique case. However, we are benefited by the guidance of the highest judicial authority in this country as embodied in *Davis v. Michigan, supra.* I understand the plight of the state, but am compelled by the authorities presented to order refunds for all members of this class. Ultimately, this decision is based on a view of fairness and equity as it appears that the interest of one class of citizens has been systematically denied in favor of a second class.

Based on the foregoing, it is

ORDERED that the partial summary judgment sought by the Plaintiff class as to liability is granted and Defendants' Motion for Summary Judgment is denied. It is

FURTHER ORDERED that all class members (approximately 43,857) who are stipulated to have filed refund applications be refunded such tax amounts as may be appropriate for each plus prejudgment interest at 6% per annum from the date those taxes were paid pursuant to § 12-47-60 of the South Carolina Code of Laws. Post judgment interest is awarded at the same interest rate; however, it will cease when the Defendants form the interest bearing common fund. It is

FURTHER ORDERED that class members who have filed or who shall file, refund applications for years 1985 through 1988, after June 8, 1989, but within applicable statute of limitations time frames, shall be refunded such tax amounts as may be appropriate plus interest. It is

FURTHER ORDERED that the Defendants are to submit to the Court, within sixty (60) days, a plan for providing notice to all class members of their rights to refunds and as to the establishment of an interest-bearing common fund to be used to deposit and distribute such refunds in an orderly fashion. The amounts to be placed in the common fund shall be determined by the Defendants, subject to any objection by the Plaintiff class and review by the Court, and the common fund shall be increased as subsequent refund applications are received for the years 1985 through 1988. The costs of the notices and related expenses to all class members shall be borne *pro rata* by the Plaintiff class members and shall be deducted from the common fund as shall attorney's fees for Plaintiffs' counsel which shall be determined at a separate hearing.

AND IT IS SO ORDERED.

/s/ _____

SIDNEY T. FLOYD
Resident Judge of the
Fifteenth Judicial Circuit

January 19, 1990

Conway, South Carolina

APPENDIX D

RESPONDENTS/APPELLANTS' "EXHIBIT 4"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29214

For release:
April 2, 1989
URGENT

Contact:
(803) 737-4406

Vicki Jinnette
(Media Use Only)

NO CHANGE IN STATE'S TREATMENT OF FEDERAL RETIREMENT BENEFITS

South Carolina income tax laws affecting federal civil service retirement benefits have not changed as a result of a United States Supreme Court ruling. The South Carolina Tax Commission will continue to enforce state laws exempting $3,000 of federal civil service pensions while allowing state employee pensions to be fully exempt from state income tax.

The Supreme Court on March 28 ruled that a Michigan law taxing state and federal pensions differently was unconstitutional. The ruling affects at least 14 states, including South Carolina.

A change in South Carolina's income tax laws will require action by the state legislature. Until such action occurs, taxpayers should not do anything differently with their 1988 state income tax return or their 1989 estimated tax payments.

The Tax Commission does not have the authority to issue refunds on federal retirement benefits for 1988 or any prior years until directed to do so by the courts or

the General Assembly. No refunds will be made under the current law in South Carolina.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers can file a South Carolina amended tax return for the 1985 tax year by April 15, 1989. These amended returns will be held for review.

The Tax Commission is currently studying the Supreme Court ruling and conferring with the state legislature on its impact on South Carolina. As changes occur, the Tax Commission will thoroughly advise taxpayers on their rights and obligations towards federal retirement benefits.

Current state law exempts $3,000 of federal retirement benefits for civil service retirees and for military retirees with 20 years of active duty service. Based on statistics from the federal government, there are approximately 65,000 federal retirees living in South Carolina. It is estimated that fully exempting all federal pensions would cost the state approximately $25-$30 million in revenue each year.

To file a 1985 amended return, taxpayers should complete form SC1040X and mail it no later than April 15 to a special post office box established by the Tax Commission for this purpose. The mailing address is: SCTC-FRA, P.O. Box 12265, Columbia, SC 29211-2265.

RESPONDENTS/APPELLANTS' "EXHIBIT 5"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29214

For release:
April 5, 1989

Contact:
(803) 737-4406

Vicki Jinnette
(Media Use Only)

HOW FEDERAL RETIREES CAN PROTECT A POSSIBLE 1985 REFUND

The United States Supreme Court on March 28 ruled that states must provide for equal taxation of federal and state retirement benefits. The ruling affects at least 14 states, including South Carolina.

South Carolina's legislature is currently examining the impact of the ruling on the state's tax laws and its potential effect on state revenue. At this time, however, no laws have been changed and taxpayers must report their federal retirement benefits as income on their 1988 income tax return as they have done in the past.

If state law is changed to exempt federal retirement benefits from South Carolina income tax, taxpayers may be eligible for a refund of taxes paid on those benefits.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers have two options to protect a possible refund for the 1985 year:

1. The federal retiree may write a letter to the South Carolina Tax Commission, including the following information: 1) Name, 2) Address, 3) Social Security number, 4) year for which they are applying for a re-

fund (in this case, 1985), and 5) state in the letter that a refund is being sought for taxes paid on federal retirement benefits.

2. The federal retiree may file an amended return, Form SC1040X, for the 1985 year. The return should include the 1) Name, 2) Address, 3) Social Security number, 4) state on the back of the return that a refund is being sought for taxes paid on federal retirement benefits, and 5) on line 23, enter the figure "$1+".

Taxpayers may choose which one of the two methods is simpler for them. Letters or amended returns must be postmarked no later than April 15, 1989, to protect the statute.

Letters and amended returns should be mailed to:

SCTC - FRA

P.O. Box 12265

Columbia, S.C. 29211-2265

RESPONDENTS/APPELLANTS' "EXHIBIT 6"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29214

For release:
April 10, 1989

Contact:
(803) 737-4406

Vicki Jinnette
(Media Use Only)

NO CHANGE IN STATE'S TREATMENT OF FEDERAL RETIREMENT BENEFITS

South Carolina income tax laws affecting federal civil service retirement benefits have not changed as a result of a United States Supreme Court ruling. The South Carolina Tax Commission will continue to enforce state laws exempting $3,000 of federal civil service pensions while allowing state employee pensions to be fully exempt from state income tax.

The Supreme Court on March 28 ruled that a Michigan law taxing state and federal pensions differently was unconstitutional. The ruling affects at least 15 states, including South Carolina.

A change in South Carolina's income tax laws will require action by the state legislature or the courts. Until such action occurs, taxpayers should not do anything differently with their 1988 state income tax return or their 1989 estimated tax payments.

The Tax Commission does not have the authority to issue refunds on federal retirement benefits for 1988 or any prior years until directed to do so by the courts or

the General Assembly. No refunds will be made under the current law in South Carolina.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers can file a South Carolina amended tax return, Form SC1040X, for the 1985 tax year by April 15, 1989. The return should include: 1) Name, 2) Address, 3) Social Security number, 4) state on the back of the return that a refund is being sought for taxes paid on federal retirement benefits, and 5) on line 23, enter the figure "$1+". It is not necessary at this time to fully complete the form.

Taxpayers may also protect the statute by writing a letter to the Tax Commission, giving the following information: 1) Name, 2) Address, 3) Social Security number, 4) year for which they are seeking a refund (in this case, 1985), and 5) state in the letter that a refund is being sought for taxes paid on federal retirement benefits. The letter should be signed by the federal retiree and dated.

No extension of the April 15, 1989, deadline for filing protective claims has been granted.

Taxpayers may choose which one of the two methods is simpler for them. The Tax Commission will hold the amended returns and letters filed as protective claims until further action is necessary. All taxpayers filing a protective claim will be notified by letter of the outcome of this situation once it has been resolved.

Letters and amended returns should be mailed no later than April 15 to SCTC - FRA, P.O. Box 12265, Columbia, SC 29211-2265.

The Tax Commission is currently studying the Supreme Court ruling and conferring with the state legislature on its impact on South Carolina. As changes occur, the Tax Commission will thoroughly advise taxpay-

ers on their rights and obligations towards federal retirement benefits.

Current state law exempts $3,000 of federal retirement benefits for civil service retirees and for military retirees with 20 years of active duty service. Based on statistics from the federal government, there are approximately 65,000 federal retirees living in South Carolina. It is estimated that fully exempting all federal pensions would cost the state approximately $25-$30 million in revenue each year.